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In The
Supreme Court of the United States

October Term, 1959
No. 363

TAHITI BAR, INC.,
Appellant
v.
PENNSYLVANIA LIQUOR CONTROL BOARD
and
COMMONWEALTH OF PENNSYLVANIA

October Term, 1959
No. 379

LEHIGH CASINO, INC.,
Appellant
v.
PENNSYLVANIA LIQUOR CONTROL BOARD
and
COMMONWEALTH OF PENNSYLVANIA

MOTIONS TO DISMISS OR TO AFFIRM

LOIS G. FORER,
Deputy Attorney General.
RUSSELL C. WISMER,
Special Assistant Attorney General.
GEORGE G. LINDSAY,
Assistant Attorney General.
ANNE X. ALPERN,
Attorney General:
Attorneys for Pennsylvania Liquor Control Board and Commonwealth of Pennsylvania.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

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MOTIONS TO DISMISS OR TO AFFIRM

STATEMENT AS TO JURISDICTION

The Attorney General of Pennsylvania on behalf of the Commonwealth of Pennsylvania and the Pennsylvania Liquor Control Board, Appellees, files this Motion to Affirm and this Motion to Dismiss in both of the above entitled matters pursuant to Rule 16 of the Rules of the United States Supreme Court asserting:

1. That the question on which the decision of both of these cases depends, namely the constitutionality of the Pennsylvania Liquor Code authorizing the revocation of a liquor license for the exhibition of "any lewd, immoral or improper" entertainment in the licensed premises when that phrase has been construed to be the equivalent of "obscene" is so insubstantial as not to need further argument.

2. That the revocation of a liquor license after two findings of fact by competent tribunals that the performance taken as a whole and judged by the average man was "obscene" does not present a substantial federal question.

3. That the affirmation of the revocation of a liquor license in accordance with the provisions of the statute and after the licensee has been accorded two hearings in which he admittedly received due process of law rests on an adequate non-federal basis.

JURISDICTION

These appeals are from orders of the Supreme Court of Pennsylvania upholding the constitutionality of certain portions of the Pennsylvania Liquor Code and Regulation 110.02D issued pursuant thereto, and affirming the orders of the Superior Court of Pennsylvania (and, in effect, of the Court of Quarter Sessions for Philadelphia County) which affirmed the order of the Pennsylvania Liquor Control Board suspending the appellants' restaurant liquor license and amusement permit. The Supreme Court of Pennsylvania issued its orders on March 25, 1959. Notice of appeal to this Court was filed with the Supreme Court of Pennsylvania on May 1, 1959. An extension of time for docketing the appeal in this Court until August 29, 1959, was granted by the Supreme Court of Pennsylvania on June 1, 1959.

Appellants invoked the provisions of 24 U.S.C. Section 1257 (2) conferring jurisdiction upon this Court to review an appeal from a final judgment of the Supreme Court of Pennsylvania.

Appellants assert that there is involved herein the constitutionality of the Pennsylvania Liquor Code, Act of April 12, 1951, P.L. 90, 47 P.S. Sec. 1-101 et seq. Article IV thereof (47 P.S. Sec. 4-493) provides in pertinent part that it shall be unlawful:

> "(10) For any licensee, his servants, agents or employes, except club licensees, to permit in

any licensed premises or in any place operated in connection therewith, dancing, theatricals or floor shows of any sort, or moving pictures other than television, or such as are exhibited through machines operated by patrons by the deposit of coins, which project pictures on a screen not exceeding in size twenty-four by thirty inches and which forms part of the machine, unless the licensee shall first have obtained from the board a special permit to provide such entertainment, or for any licensee, under any circumstances, to permit in any licensed premises any lewd, immoral or improper entertainment, regardless of whether a permit to provide entertainment has been obtained or not. The board shall have power to provide for the issue of such special permits, and to collect a fee for such permits equal to one-fifth of the annual license fee but not less than twenty-five dollars ($25). All such fees shall be paid into the State Stores Fund. No such permit shall be issued in any municipality which, by ordinance, prohibits amusements in licensed places. Any violation of this clause shall, in addition to the penalty herein provided, subject the licensee to suspension or revocation of his permit and his license.

Section 494 of the Pennsylvania Liquor Code (47 P.S. Section 4-494) provides for penalties for violation of Article IV:

"(a) Any person who shall violate any of the provisions of this article, except as otherwise specifically provided, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars

($100), nor more than five hundred dollars ($500), and on failure to pay such fine, to imprisonment for not less than one month, nor more than three months, and for any subsequent offense, shall be sentenced to pay a fine not less than three hundred dollars ($300), nor more than five hundred dollars ($500), and to undergo imprisonment for a period not less than three months, nor more than one year.

"(b) The right of the board to suspend and revoke licenses granted under this article shall be in addition to the penalty set forth in this section."

The Superior Court in its opinion ruled specifically on the constitutionality of the words "lewd, immoral or improper" holding that "the words used in the Pennsylvania Liquor Code provides substantially the same concept as do the words of the Federal statute [18 U.S.C. Sec. 1461] or the California statute [West's Cal. Penal Code Ann., 1955, Sec. 311] and the words taken together, are sufficiently precise. We are of the opinion that the words used in the lower court when taken together are sufficiently clear to enable any ordinary person to understand what kind of entertainment is proscribed. The court below in its opinion expressly found that the entertainment was a predominant appeal to prurient interest. In its opinion, the court below made express reference to the Roth and Alberts cases hereinbefore referred to, and we are convinced that the proper standard for evaluating the entertainment was used." The Supreme Court of Pennsylvania affirmed the decision of the Superior Court.

Jurisdiction

Also involved herein is Section 110.021 of the Regulations promulgated by the Pennsylvania Liquor Control Board, which provides in pertinent part:

> "No licensee shall require, request or permit any person engaged directly or indirectly as an entertainer in the licensed establishment or in any room or place connected therewith, to contact or associate with the patrons in such establishment, room or place for any purpose whatsoever * * *."

The Superior and Supreme Courts of Pennsylvania sustained the constitutionality of this section of the Regulations.

4. That a regulation of the Pennsylvania Liquor Control Board prohibited the mingling of entertainers and patrons in licensed premises where liquor is sold and consumed is a matter exclusively within the police power of this state and does not present a federal question.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania in both cases filed March 25, 1959, is reported at 395 Pa. 355, 150 A. 2d 112. The opinion of the Superior Court of Pennsylvania in Tahiti Bar filed June 11, 1958, is found at 186 Pa. Superior Ct. 214, 142 A. 2d 491, and the opinion of the Court of Quarter Sessions for the County of Philadelphia, filed May 20, 1957 is not reported. The opinion in Lehigh Casino, filed June 11, 1958, is found at 186 Pa. Superior Ct. 223, 142 A. 2d 495 and the opinions of the Court of Quarter Sessions for the County of Philadelphia filed July 26, 1957 and November 14, 1957 are not reported.

COUNTERSTATEMENT OF QUESTIONS INVOLVED

The questions presented by these appeals are:

1. Whether Section 493 of Article 4 of the Pennsylvania Liquor Code authorizes the revocation of a liquor license *after* the exhibition of "lewd, immoral or improper" entertainment on the licensed premises when that phrase has been construed by the Pennsylvania courts to be synonymous with "obscene" and defined as entertainment in which there "was a predominant appeal to prurient interest", does not conform to the requirements of the Fourteenth Amendment.

2. Whether since the entertainment in question was found as a fact to be "obscene" as constitutionally defined, any question as to the right of the state to prohibit entertainment when such prohibition would otherwise be violative of the Fourteenth Amendment is moot.

3. Whether the findings of the fact of obscenity by two competent tribunals raises any constitutional question.

4. Whether Regulation 110.02D prohibiting entertainers from mingling with patrons of licensed premises where liquor is sold or consumed is outside the ambit of the Fourteenth Amendment and within the police power of the Commonwealth.

STATEMENT OF THE CASE

Both of the appellants operate in the City of Philadelphia, establishments licensed under the Pennsylvania Liquor Code. On November 1, 1956, the Pennsylvania Liquor Control Board found that appellant, Tahiti Bar, had permitted "lewd, immoral and or improper" entertainment on the licensed premises on April 3 and 4, 1956, and that appellant permitted "entertainers to contact and or associate with patrons" on the licensed premises on April 3 and 4, 1956. On December 19, 1956, the Pennsylvania Liquor Control Board found that appellant, Lehigh Casino, had permitted "lewd, immoral and or improper" entertainment on the licensed premises on May 24, and May 26, 1956, and that appellant permitted "entertainers to contact and or associate with the patrons" on the licensed premises. The Board, therefore, suspended the restaurant liquor license and amusement permit of Tahiti Bar for 40 days and the license and amusement permit of Lehigh Casino for 60 days.

The evidence before the Board was stipulated as evidence also before the Court of Quarter Sessions for Philadelphia County in the appeals to that court from the Board's orders of suspension. The testimony of the enforcement officers of the Board in each case was to the effect they visited the premises on the specified dates. The officers observed "exotic" dances. At no time has appellant contended that the entertainments were not, in fact, obscene or that there was insufficient evidence to sustain the findings of fact by the Board

and the independent findings by the Court of Quarter Sessions. The stipulated evidence was in part as follows:

> "At the time we entered, the show was in progress and a girl named Laura Mason was on the stage; she was a black haired girl. She was attired in a black jacket and black skirt, which was open in the front. She was wearing black net hose. After strutting about the stage, she removed the jacket and was wearing a black bra trimmed with rhinestones. She removed the skirt and was wearing a black G string with silver ornaments over the private area. She then removed the black bra and was wearing a flesh net bra over silver pasties. Still later, she removed the net bra and was wearing silver pasties only. * * * she also later removed the silver ornament which dangled over her private area and was then wearing nothing but the silver pasties and the black G string. She performed bumps and grinds and also touched and held her breasts with her hands and also ran her hands over and on her private area. While remaining stationary, she would move her lower extremities, including her vaginal area, in a backward and forward movement. * * *" (Record before the Superior Court of Pennsylvania. In the matter of Commonwealth of Pennsylvania v. Lehigh Casino, Inc. pp. 5a and 5b.)

ARGUMENT

I. This Case Does Not Involve Infringements Upon the Right of Freedom of Expression

At the outset, it must be recognized that this case involves the revocation of a liquor license; it is not concerned with censorship of speech, press or motion pictures.[1] It does not involve a prior restraint upon any type of expression whatsoever; it does not involve a criminal penalty. Counsel for the appellant attempts to make this case involving the revocation of a liquor license for lewd and obscene entertainment and fraternizing of the entertainers with the patrons a constitutional case involving freedom of speech and expression. Each license was suspended only after a finding by the Board that the entertainment was in fact obscene. No question of due process in the nature of the hearing or the procedure followed is at issue. Nor has there been any seizure of property or damage to the appellant's business. The only action of the Board was to suspend the license of the appellant.

[1] The Commonwealth is not attempting to revert to the Comstock law to reinstate the rule of *Regina v. Hicklin*, 3 Q.B. 360 (1868), or to urge a return to the status of the law of censorship prior to *Burstyn v. Wilson*, 343 U.S. 495. The Commonwealth maintains that it is within its police power to suspend or revoke a liquor license when the licensee is in violation of the state statute prohibiting lewd performances in a licensed establishment. Cf. the English law of obscenity: Williams, *Obscenity in Modern English Law*, 20 Law & Contemp. 630 (1955).

Tahiti Bar, for a period of forty (40) days and the license of appellant, Lehigh Casino, for a period of sixty (60) days. A supersedeas was granted in each case, pending a final determination of the litigation.

Considerable reference has been made to *Hallmark Productions, Inc. v. Carroll*, 384 Pa. 348 (1956). It should be noted that in the cited case the Commonwealth argued before the Pennsylvania Supreme Court that the Pennsylvania Motion Picture Censorship Act was unconstitutional in the light of the recent United States Supreme Court decisions. The Supreme Court of Pennsylvania invalidated the motion picture censorship act, but also pointed out that "even if all precensorship of motion picture films were to be held invalid this would not in and of itself affect the right to suppress objectional films it exhibited, or to punish their exhibitor". *Hallmark Productions Inc. v. Carroll*, supra, at page 358. In the case at bar, the licenses have been suspended after obscene entertainment was permitted on the premises. There is nothing in the recent cases involving censorship and freedom of expression which in any way casts doubt upon the validity of these sections of the Pennsylvania Liquor Code.

II. A Liquor License Is a Privilege Which May Be Granted Upon Reasonable Conditions or Withheld Entirely

The state has plenary power to regulate, control or prohibit the use and sale of alcoholic beverages: *Goesaert v. Cleary*, 335 U.S. 464 (1948); *State Board of Equalization of California*, 299 U.S. 59 (1936); *Ziffrin v. Reeves*, 308 U.S. 132 (1939); *Crane v. Campbell*, 245 U.S. 304 (1917).

The authority of the Commonwealth to prohibit entirely or to regulate the sale and possession of liquor is an "exercise of police power for the protection of the public welfare—and the morals of the people." *Commonwealth v. Stofchek*, 322 Pa. 513 (1936). A liquor license is a privilege and not a property right. *Cavanaugh v. Gelder*, 364 Pa. 361 (1950), cert. den. 340 U.S. 822; *Spankard's License*, 138 Pa. Superior Ct. 251 (1939). In the granting and revocation of liquor licenses under the police power, the Commonwealth may establish the regulations and terms upon which the license may be granted and retained. *Commonwealth v. Speer*, 157 Pa. Superior Ct. 197 (1945); *Bogle's License*, 8 Pa. Superior Ct. 521 (1898), aff. 190 Pa. 577 (1899).

The respondent is engaged in the restaurant business. As a matter of fact, were this establishment one where entertainment was the business rather than a mere incident of another endeavor, no license could be lawfully issued. The Liquor Code, the Act of April 12, 1951, P.L. 90, Article IV, §463(a) provides:

> "No license for the sale of liquor or malt or brewed beverages in any quantity shall be granted to the proprietors, lessees, keepers, or managers of any theater, circus, museum or other place of amusement. . . ."

It is a business which, through its desire to serve alcoholic beverages, has submitted to the jurisdiction of the Pennsylvania Liquor Control Board and the provisions of the Liquor Code, and to which entertainment is but an inducement offered to secure patronage. In so submitting, the license acquires only a privilege to operate in a mode and manner to be prescribed by the State. In fact, the courts have held that the liquor business is unlawful and its conduct is only lawful to the extent and in the manner permitted by statute. *Sawdey Liquor License Case*, 169 Pa. Superior Ct. 214 (1951). The legislature might therefore forbid any entertainment or amusement upon the licensed establishment. The Supreme Court of Pennsylvania, in *Cavanaugh v. Gelder*, supra, ruled:

> "The legislature had the power to absolutely forbid, or to grant under specified conditions, licenses for the sale of intoxicating liquors. It had the power to absolutely forbid or to permit under specified conditions, entertainments in licensed establishments."

The Liquor Control Board is authorized to suspend or revoke the license of any licensee violating any provision of the Liquor Code. From the foregoing discussion it is clear that a liquor license is subject to regulation and control under the police power of the State.

III. The Phrase "Lewd, Improper or Immoral" as Construed by the Pennsylvania Courts, Meets the Requirements of the Fourteenth Amendment and the Proposed Definitions of the American Law Institute

The Pennsylvania Liquor Control Board found, on the undisputed testimony of the eyewitnesses, that the entertainments in question were in violation of the statute.

Three Pennsylvania courts have held that under any definition of obscenity the entertainments were in fact obscene. The Supreme Court of Pennsylvania stated: "Nor do we have any hesitation in affirming the decision of the courts below that the entertainment in question violated Section 493 in that it was 'lewd, immoral and or improper'. Both the trial court and the Superior Court, equating the terms 'lewd and improper' with 'obscene', found that the entertainment was a predominant appeal to prurient interests. Thus both tribunals, applying the test associated with attempts on the part of a state to restrict freedom of speech and expression, * * * found that appellants had violated Section 493 and that their licenses had been properly suspended. Our view of the record demonstrates the propriety and correctness of this determination. No purpose would be served by a repetition of the factual description of the entertainment contained in the record to demonstrate, as stated by the Superior Court, that it 'was lewd or obscene as well as immoral under any definition of these terms.'" *Tabiti Bar, Inc. Liquor License Case, Lehigh Casino Liquor License Case*, 395 Pa. 355, at pp. 367, 368.

The phrase "lewd, immoral or improper" as construed by the Pennsylvania courts is not vague or indefinite. The statute must be read in the light of the construction placed upon this provision by the Pennsylvania Courts. *Speiser v. Randall*, 357 U.S. 513, 519 (1958).

Note that in *Kingsley International Pictures Corporation v. Regents of New York*, 360 U.S. 684 (1959), a determining factor was the explicit rejection by the Court of Appeals of a finding that the film was obscene. There can be little doubt that the State, under its police power, may punish as criminal conduct the exhibition of obscene performances. The issue as to whether the entertainments here in question were or were not obscene has not been raised by the appllants. Apparently, appellants concede that these entertainments were obscene since they place their reliance upon the argument of the inadequacy of the definition of "obscenity" in the light of the protection of the Fourteenth Amendment. It is a truism that although obscenity may be difficult to define, it is easy to recognize. This court can make its own determination from the record as to whether or not the appellate courts of Pennsylvania erred in affirming the findings that the entertainments were, in fact obscene. In *Roth v. United States*, 354 U.S. 476 (1957), the finding of obscenity by the trier of fact was not reviewed by the appellate court. It was upon this ground that Mr. Justice Harlan based his dissent. The Commonwealth submits that the Court of Quarter Sessions, the Superior Court and the Pennsylvania Supreme Court were correct in holding that a finding of obscenity under any definition is amply supported by these records.

The definition of obscenity, as construed by the Pennsylvania Courts, has been commended by legal scholars. Moreover there has been no complaint that the Board has abused its statutory authority to "censor" artistic performances or controversial expression of any sort. The appellants are, in effect, urging that this Court reverse itself and adopt the clear and present danger test as applied to obscenity which it expressly rejected in the *Roth* case, supra.

The Liquor Code provides that a license may be revoked if the entertainment on the licensed premises is "lewd, immoral or improper". Both the Commonwealth and the courts below treated these three words as interchangeable synonyms for "obscene". The Pennsylvania Penal Code, 18 P.S. §4524, makes criminal the sale or distribution "of any obscene, lewd, lascivious, filthy, indecent or disgusting book". The sufficiency of standards in this definition was sustained by the Superior Court in *Commonwealth v. Feigenbaum*, 166 Pa. Superior Ct. 120 (1950), affirming *Commonwealth v. Gordon*, 66 D. & C. 101 (1949).

The statute involved in the *Roth* case, supra, was the federal obscenity statute, which is very similar to that of Pennsylvania. It declares to be nonmailable "every obscene, lewd, lascivious or filthy book, pamphlet, picture, paper, letter, writing, printing, or other publication of an indecent character. * * *" 18 U.S.C. 1461. In the companion case, *Alberts v. California*, 354 U.S. 476 (1957), the California Penal Code made anyone who writes, publishes, etc., any "obscene or indecent writing, paper or book" guilty of a misdemeanor. This Court found little difficulty with the use of the language in either statute. In both cases,

the lower courts had followed tests similar to that adopted by the Pennsylvania Courts in the *Feigenbaum* case and by the Pennsylvania Superior Court in the cases at bar and had considered whether the publication taken as a whole, as applied to the average person, constituted "dirt for dirt's sake".

In the cases at bar, the Court of Quarter Sessions held that the words in the Liquor Code provide the same concept and standard as the words of the federal statute or the California statute and that the words taken together in this context are sufficiently precise. With respect to the word "improper", the court stated: "Half the phrase is enough for the awareness of the reasonable man; only the word 'improper' might not be enough, for this word alone may turn upon taste rather than decency." Therefore, the court construed the phrase "lewd, immoral or improper" as synonymous with "obscene". The court found as a fact that the entertainment in each instance was "lewd, immoral or improper". In view of this careful opinion, it cannot be argued that the use of the disjunctive in the court's order, merely following the wording of the statute, is a holding that the entertainment was not lewd, immoral and improper and, in other words, obscene. There is, therefore, no constitutional lack of definiteness of standards in the Liquor Code.

Appellant attempts to substitute for the Pennsylvania definition of obscenity, i.e., "dirt for dirt's sake", in considering the publication or presentation as a whole and its effect upon the average adult, that the American Law Institute: §207.10(2). "Obscenity" is there defined as follows:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest,

i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even if the obscenity is latent, as in the case of undeveloped photographs. Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience."

The subtle distinctions between the two definitions are irrelevant to the cases at bar. Testing the entertainments in question by the ALI standards, we find that it falls well within all of its criteria.

The conduct of the entertainers as testified to, was "considered as a whole" by the court below. "Its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex * * * and it goes substantially beyond customary limits of candor in description or representation of such matters." It can hardly be argued that customary candor includes "bumps and grinds" by a practically unclothed female entertainer in a bar.

The ALI further provides that it shall be admissible to show the following five factors:

> "(a) the character of the audience for which the material was designed or to which it was directed."

The Superior Court observed that in the case at bar, the audience consisted of male patrons of an ordinary bar. Under this standard, a select audience

of college professors or aesthetes engaged in watching esoteric dances might view nude dancers engaging in erotic motions and gestures and such a performance might not under the circumstances be considered obscene. There is no suggestion in the record that the purpose of this entertainment was other than to appeal to the prurient interest of the patrons of the bar or that the character of the patrons of this bar was in any way special or entitled to unusual consideration. Such a conclusion based upon the undisputed record showing the nature of the bar and the numbers and sex of the patrons was clearly justified. Indeed, appellant does not argue to the contrary.

> "(b) what the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on behavior of such people."

Appellant has not attempted to show what appeal for or what effect on the ordinary adult or any other person this entertainment would have. We believe that the Superior Court and the Supreme Court of Pennsylvania on this stipulated record properly took judicial notice of the appeal of this entertainment to the ordinary adult patron of a bar and the effect it would have upon his behavior.

> "(c) Artistic, literary, scientific, educational or other merits of the material."

Appellant has not alleged that this entertainment has any artistic, literary, scientific, educational or other merit. We do not argue that a communication must be meritorious or of artistic excellence to receive the protections of the First and Fourteenth Amendments. However, with respect to obscenity, the ALI has in-

cluded criterion (c) in an obvious effort to protect works of scientific or artistic merit which might otherwise be construed as "obscene" by illiterate or semi-illiterate censorship groups. The record discloses no artistic merit of any kind in this entertainment and none is alleged by appellant.

> "(d) the degree of public acceptance of the material in this country."

Whether or not this factor of public acceptance is or should be the law of Pennsylvania and a determining criterion in judging the constitutionality of State statutes under the Fourteenth Amendment is a question which need not be decided in this case. Appellant has not argued that the Philadelphia public accepts this type of entertainment in public places and that, therefore, it should not be considered obscene. Such a major premise, we submit, would be wholly without factual foundation.

> "(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material."

The appeal of this entertainment can be only to prurient interest and for the promotion of the sale of liquor. The Superior Court and the Supreme Court so found.

> "(f) purpose and reputation of the author, publisher or disseminator."

This subsection is, of course, wholly inapplicable to the instant case.

We conclude, therefore, that under the standards urged by appellant, the entertainment in question was properly held to be obscene.

IV. The Grounds for Revocation of a Liquor License Do Not Offend the Fourteenth Amendment by Unconstitutionally Abridging Freedom of Speech

In the *Roth* case, supra, Mr. Justice Brennan, speaking for the majority, stated at page 481, "The dispositive question is whether obscenity is utterance within the area of protected speech and press." The Court held that obscenity was outside that protection. The entire thrust of appellant's argument is that the United States Supreme Court was wrong and that it should reverse itself.

Appellant further argues that the revocation of a liquor license for obscene entertainment which merely arouses lustful desires or thoughts on the part of the viewers is penalizing the viewer for thoughts rather than conduct. The liquor license is revoked not for the thoughts which are aroused in the beholders of the entertainment, but for the knowing and willful conduct of the licensee in providing such entertainment in violation of the statute. It must be borne in mind that appellants are holders of a liquor license and, additionally, permits to present entertainment at a bar or taproom. The permit to present entertainment could be withheld altogether. Likewise, the liquor license itself is not a matter of right (see point II infra).

Appellants lean heavily upon the dissenting opinions in the obscene literature cases. In *Kingsley v. Brown*, 354 U.S. 436 (1957), the majority sustained the New York statute permitting a preliminary injunction against the sale or distribution of pornographic litera-

ture. Chief Justice Warren dissented, stating, "It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature". In the case at bar, it is not the entertainer who is punished but the licensee whose license is revoked. The entertainment is not judged in vacuo but in the context of entertainment in a premise which has a liquor license. Moreover, the statutory remedy is not injunction to restrain conduct but the suspension or revocation of the license after the offending entertainment has been presented and has been found by the Liquor Control Board, after a hearing, to be "obscene". In view of these facts, the action of the courts below meets the requirements of both the majority and the dissenting opinions in the leading Supreme Court cases.

It should be noted that these standards apply to books. Greater latitude to prohibit pornography has been allowed the states in respect to pictures and motion pictures. Compare *Butler v. Michigan*, 352 U.S. 380 (1957), indicating that a separate standard of impropriety for children would not be unconstitutional. In like manner, other conditions prevail with respect to live performances in premises where liquor is sold and consumed. This Court in *Kingsley Pictures Corporation*, supra, at page 383, pointed out that it would not at that time determine whether the controls which a state may impose upon motion pictures "are precisely coextensive with those allowable for newspapers, books or individual speech". The standard applied by the lower courts in the cases at bar was the highest constitutional protection afforded to the printed word and individual speech. See, Note, *Control of Entertainment*, 71 Harv. L. Rev. 326 (1950).

V. There Is No Constitutional Requirement for Trial by Jury in the Revocation of a Liquor License

Again, the appellant has seized upon words in one of the dissenting opinions in *Kingsley v. Brown*, supra. Mr. Justice Brennan there questioned the right of the defendant to a jury trial.[1] It should be noted that in the cited case the New York statute provided for the seizure of obscene literature. Even the appellants in that case did not raise the issue of necessity for a jury trial to provide due process of law in a misdemeanor prosecution. In the case at bar, the revocation of a license is purely a statutory matter. There is no authority whatsoever for the contention that the appellants have been denied due process of law in the nature of the hearings which they have had to date. Each appellant has had a full and complete hearing before an examiner; each has had a complete consideration by the Pennsylvania Liquor Control Board. The cases were heard de novo on stipulated evidence before the Court of Quarter Sessions. All of those arguments were exhaustively considered by both the Superior Court and the Supreme Court of Pennsylvania. Appellants are not being deprived of liberty or property without due process of law. No property

[1] No penalties, as provided in the statute, were invoked against appellant. The right to a jury trial for the imposition of penalties (Question IV in each of appellants' Statements of Questions Presented) is not before this court. We deem the law to be well settled that there is no right to a trial by jury in such a case under Pennsylvania law. No federal constitutional question is involved.

has been taken. There is no suggestion that the action taken has been arbitrary or even mistaken. Innumerable state and federal agencies grant and revoke licenses and permits. Many of those involve substantial businesses and large sums of money. It has never been suggested that any licensee is entitled to more than a fair hearing before the administrative body and a right of appeal to a court. The constitutional right to a jury trial in Pennsylvania exists only with respect to actions in which under the common law there was a right to trial by jury. It is clear that under the law of Pennsylvania, the revocation of a license or a permit does not give rise to a right of trial by jury. *Premier C. & B. Co. v. Pennsylvania Alcohol P. B.*, 292 Pa. 127 (1928); *Waston Appeal*, 377 Pa. 495 (1954), cert. den. 348 U. S. 879; and *Commonwealth v. Penelope Club*, 136 Pa. Superior Ct. 505 (1939). Appellants have not cited any law to the contrary. Diligent research has failed to disclose any opinion which even inferentially casts doubt upon this question.

The fact that this revocation involves entertainment by unclothed dancers rather than a violation of service regulations by a public utility or purity of standards by a milk dealer does not bring into play either the right of free speech or the right of a trial by jury. No question arises under the Fourteenth or Seventh Amendments.

VI. Whether the State in its Regulation of the Privilege of Dispensing Alcoholic Beverages May Condition That Privilege by Prohibiting Conduct Which Might in Another Setting Be Constitutionally Protected Is Moot in View of the Finding That the Entertainment Was in Fact Obscene

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The Pennsylvania Supreme Court expressly affirmed the findings of the two lower courts that the entertainment was, in fact, obscene under the most restrictive constitutional definition. Thus, the additional reasoning of the Pennsylvania Supreme Court that with respect to the privilege of dispensing liquor, the control of the state exceeds that which it has in other settings is mere surplusage. It may well be argued that in its absolute control over the licensing of establishments to dispense liquor, the state is authorized to impose any reasonable conditions upon the granting of a license. *Crane v. Campbell*, 245 U. S. 204 (1917). Since the suspension of the license was under circumstances in which there was strict conformity with the requirements with the Fourteenth Amendment, the extent of the state's power is not at issue in the cases at bar.

VII. The Regulation of the Liquor Control Board Prohibiting Entertainers from Associating With Patrons in Licensed Premises Is a Valid, Reasonable and Constitutional Exercise of Police Power

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The Pennsylvania Liquor Control Board is given broad, general powers and duties with respect to the enforcement of the act. Under §207, 47 P.S. §2-207 (h) (i), the Board is authorized:

> "Without in any way limiting or being limited by the foregoing, to do all such things and perform all such acts as are deemed necessary or advisable for the purpose of carrying into effect the provisions of this act and the regulations made thereunder."

and

> "from time to time to make such regulations not inconsistent with this act as it may deem necessary for the efficient administration of this act."

Under Article 4 of the Liquor Code, it is unlawful for a licensee to provide any entertainment whatsoever unless he has obtained a special permit from the Board. The purpose of the Liquor Code, as stated in 1-104(a) is as follows:

> "This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people of the Commonwealth, and

to prohibit forever the open saloon; and all of the provisions of this act shall be liberally construed for the accomplishment of this purpose."

In the light of these various sections, the Board has promulgated the regulation here under attack, namely, the prohibition against entertainers associating with patrons. The Superior Court held that: "It is self-evident that the mingling of practically nude or scantily-clothed female entertainers with male patrons of a bar does not promote the public morals and welfare." This decision was affirmed by the Supreme Court. The record discloses that there were twenty five male patrons and no female patrons at the Tahiti Bar on April 4, 1956. On April 3, 1956, there were twenty male patrons present (Record in the Pennsylvania Supreme Court p. 16a). In determining whether licenses which will promote the public morals and welfare shall be given and whether such licenses should include permits for entertainment, the Board is authorized to make such regulations as it deems necessary for the efficient administration of the act. Such regulations could reasonably include the prohibition of conduct on the part of entertainers which might be contrary to the public welfare and morals. We submit that the finding of the Superior Court, affirmed by the Supreme Court was amply supported by the evidence.

No federal question arises under this regulation.

CONCLUSION

The court below, on the basis of uncontroverted evidence, found that the entertainments in question were in violation of the State statute and applied a definition of "obscenity" which meets the requirements of both Pennsylvania law and the United States Constitution. The regulation in question was properly adopted under the authorization of the act and was within the police power of the state. Therefore, the Commonwealth urges that the appeals be dismissed or that the decisions be affirmed.

Respectfully submitted,

Lois G. Forer,
Deputy Attorney General.

Russell C. Wismer,
Special Assistant Attorney General.

George G. Lindsay,
Assistant Attorney General.

Anne X. Alpern,
Attorney General.

Attorneys for Pennsylvania Liquor Control Board and Commonwealth of Pennsylvania.